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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SUN DRILLING PRODUCTS CORPORATION, HELLER, HICKOX, DIMELING, SCHREIBER AND PARK, DOUGLAS P. HELLER, GEORGE K. HICKOX, JR., WILLIAM R. DIMELING, RICHARD R. SCHREIBER, STEVEN J. PARK, JOHN C. TUTEN, HYPPOLETE ASTUGUE AND SUSAN REESE

Petitioners,

v.

JERRY J. RAYBORN, SR.

Respondent,

On Petition For A Writ Of Certiorari To The Court Of Appeal Fourth Circuit State Of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's holding in *Prima Paint*, that an arbitration clause in a contract governed by the Federal Arbitration Act is not vitiated by general allegations that the entire contract was fraudulently induced, was overruled by this Court's subsequent decision in *Doctor's Associates*, which did not address the key issues in *Prima Paint* and made no mention of *Prima Paint* whatsoever.

2. Whether, in direct contravention of this Court's holding in *Prima Paint*, the Louisiana Fourth Circuit Court of Appeal erred by refusing to enforce a mandatory arbitration clause in an agreement it acknowledged was governed by the Federal Arbitration Act, where respondent sought to avoid his agreement to arbitrate simply by making general allegations of fraud in the inducement of the contract as a whole.

PARTIES TO THE PROCEEDING

Sun Drilling Products Corporation has no parent companies. Sun Drilling Products Corporation partially owns Sun Drilling Products de Venezuela, C.A.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 98-

SUN DRILLING PRODUCTS CORPORATION, HELLER, HICKOX, DIMELING, SCHREIBER AND PARK, DOUGLAS P. HELLER, GEORGE K. HICKOX, JR., WILLIAM R. DIMELING, RICHARD R. SCHREIBER, STEVEN J. PARK, JOHN C. TUTEN, HYPPOLETE ASTUGUE AND SUSAN REESE

PETITIONERS,

vs.

JERRY J. RAYBORN, SR.

RESPONDENT,

Petition For A Writ Of Certiorari
To The Court Of Appeal
Fourth Circuit State Of Louisiana

Sun Drilling Products Corporation, Heller, Hickox, Dimeling, Schreiber and Park, Douglas P. Heller, George K. Hickox, Jr., William R. Dimeling, Richard R. Schreiber, Steven J. Park, John C. Tuten, Hyppolete Astugue and Susan Reese respectfully petition for a writ of certiorari to review

the judgment of the Court of Appeal Fourth Circuit State of Louisiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeal Fourth Circuit State of Louisiana (App., *infra*, 3a) is reported at *Sun Drilling Products Corp. v. Rayborn*, 703 So.2d 818 (La. Ct. App. 1997). The judgment of the trial court (App., *infra*, 13a) is unreported. The order of the Louisiana Supreme Court denying discretionary review (App., *infra*, 1a) is unreported.

JURISDICTION

a) On March 13, 1998, the Supreme Court of Louisiana declined to review the order dated December 3, 1997 of the Court of Appeal Fourth Circuit State of Louisiana.

b) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

c) On June 10, 1997, Petitioners, by means of filing objections to the trial court's subject matter jurisdiction, invoked their rights under the Federal Arbitration Act to compel arbitration of Rayborn's claims. On August 21, 1997, the trial court overruled Petitioners' objections. Petitioners timely appealed this decision to the Court of Appeal Fourth Circuit State of Louisiana. The Court of Appeal affirmed the trial court's decision. Petitioners' timely application for rehearing before the Court of Appeal was refused without comment on December 30, 1997. Finally, Petitioner sought discretionary review from the Louisiana Supreme Court. On March 13, 1998, Petitioners' application for review was denied, with two Justices voting to grant the application.

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act provides, in pertinent part, 9 U.S.C. § 1-14 (1998):

9 U.S.C. § 1: "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United Sates or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2: Validity, irrevocability and enforcement of agreements to arbitrate.

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Until 1995, Jerry J. Rayborn, Sr. (hereinafter "Rayborn") and his three children owned all of the shares of stock of Sun Drilling Products Corporation (hereinafter "Sun"). In 1995, Rayborn and his family sold 75% of Sun's stock to, *inter alia*, the partners of Heller, Hickox, Dimeling, Schreiber and Park (hereinafter "HHDS&P") for $9.5 million, notes in the amount of $2.8 million, and debt forgiveness of several million dollars. The terms of the sale were set forth in a December 8, 1994 contract known as the "Merger Agreement" between Rayborn and his family and the partners of HHDS&P. The Merger Agreement contained a mandatory arbitration clause. (App., *infra*, 20a).

After the sale of Sun, Rayborn was a 25% minority shareholder and a member of Sun's board. Sun and Rayborn entered into an employment agreement ("the Employment Agreement") which provided for Sun to employ Rayborn at a

salary of $120,000 per year, plus future royalty payments under certain circumstances. Among other things, the Employment Agreement required Rayborn to devote his best efforts to the performance of his duties in furtherance of Sun's interests. The Employment Agreement did not contain an arbitration clause.

On March 17, 1997, Sun terminated Rayborn's employment because he breached his Employment Agreement, breached his fiduciary duties to Sun as a director and shareholder, and engaged in schemes to Sun's detriment. Concurrent with his firing, Sun filed an action in Louisiana state court seeking damages and a declaratory judgment that Rayborn had breached the Employment Agreement.

Sun neither requested relief under the Merger Agreement nor alleged that the Merger Agreement was implicated in any manner. Sun based its action against Rayborn on the Employment Agreement, not the Merger Agreement.

On May 1, 1997, Rayborn filed his Answer to Sun's action. In his Answer, Rayborn included a claim seeking rescission of the Merger Agreement, alleging fraud in the inducement. Rayborn also purported to assert other claims against HHDS&P and other parties arising from the Merger Agreement. Rayborn and certain parties previously had agreed to submit all disputes arising in connection with the Merger Agreement to binding arbitration.

Rayborn sought to escape the mandatory arbitration provision of the Merger Agreement by alleging that the Merger Agreement as a whole was fraudulently induced. Rayborn has argued that, notwithstanding the arbitration clause, Louisiana law prohibits arbitration of such a claim. The arbitration clause in the Merger Agreement, however, is

controlled by the Federal Arbitration Act, which does not permit a party to avoid its promise to arbitrate simply by alleging fraud in the inducement of a contract as a whole.

Petitioners objected to Rayborn's claims on the grounds that the trial court lacked subject matter jurisdiction and sought to compel arbitration proceedings pursuant to the Merger Agreement and the Federal Arbitration Act. On August 21, 1997, the trial court overruled Petitioners' objection based on the Federal Arbitration Act and stayed any arbitration of the dispute. The trial court incorrectly held that the Federal Arbitration Act did not govern the arbitration clause at issue and found that Louisiana law prohibited the arbitration of Rayborn's claim of fraud in the inducement.

Petitioners appealed and sought to compel arbitration of Rayborn's claims. Petitioners also asked that further proceedings on Rayborn's claims be stayed pending the outcome of the appeal.

By opinion dated December 3, 1997, the Louisiana Fourth Circuit Court of Appeal ("Court of Appeal") affirmed the trial court's decision. (App., *infra*, 8a). The Court of Appeal correctly determined that the Federal Arbitration Act governed the arbitration clause. (App., *infra*, 5a). However, the Court of Appeal held that this Court's 1996 decision in *Doctor's Associates* allowed generally applicable state law contract defenses, such as fraud, duress or unconscionability, to invalidate an arbitration clause without contravening the Federal Arbitration Act. (App., *infra*, 5a). Thus, the Court of Appeal erroneously ruled that the Federal Arbitration Act permits parties to avoid arbitration simply by alleging fraud in the inducement of the contract.

On December 12, 1997, Petitioners asked for rehearing. Rehearing was refused without comment on December 30, 1997. (App., *infra*, 12a).

On January 29, 1998, Petitioners sought discretionary review from the Louisiana Supreme Court. Again, Petitioners sought a stay of Rayborn's claims under the Merger Agreement. On March 13, 1998, the Supreme Court of Louisiana, with two Justices dissenting, denied Petitioners' application for review and stay. (App., *infra*, 1a). Accordingly, Petitioners seek a Writ of Certiorari from this Court.[1]

REASONS FOR GRANTING THE WRIT

The Federal Arbitration Act mandates rigorous enforcement of arbitration clauses in contracts affecting interstate commerce.

In *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395, 403, 404 (1967), this Court held that a party to a contract containing an arbitration clause may not avoid arbitration simply by claiming that the entire contract is invalid. Accordingly, *Prima Paint* sets the legal standard -- now well established -- that an arbitration clause must be enforced unless the clause itself specifically is found to be invalid.

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[1] Contemporaneously with this petition, Petitioners have applied for a stay of Rayborn's claims pending final action on this petition and/or review of the Court of Appeal's decision.

In *Doctor's Associates*, this Court held that no state may treat an arbitration clause differently from any other contractual obligation. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). Consistent with the policies underlying the Federal Arbitration Act, as well as *Prima Paint*, *Doctor's Associates* stands for the proposition that states may not impose additional enforceability requirements on arbitration clauses to make them easier to avoid.

The majority opinion below read *Doctor's Associates* as overruling *Prima Paint* and 30 years of United States Supreme Court precedent. *Prima Paint* remains as viable today as when it was decided in 1967. Moreover, this Court's decision in *Prima Paint* is dispositive of this dispute. The Court of Appeal should have applied *Prima Paint* and reversed the trial court's refusal to enforce the arbitration clause.

Rayborn's claims center around the sale of Sun pursuant to the Merger Agreement. Specifically, Rayborn seeks:

- rescission of the Merger Agreement and related agreements,
- damages for breach of, and conspiracy to breach, the Merger Agreement and related contracts,
- damages for alleged violation of, and conspiracy to violate, Louisiana's Unfair Trade Practices and Consumer Protection Law in accordance with performance of the Merger Agreement and related agreements,
- damages for breach of, and conspiracy to breach, the Merger Agreement and related contracts, and
- damages for allegedly tortiously interfering, and conspiring to tortiously interfere, with the Merger Agreement.

The Merger Agreement, however, states unambiguously that all disputes arising in connection with it must be submitted to binding arbitration:

> All disputes arising in connection with this agreement shall be finally settled under the rules and regulations of the American Arbitration Association . . . .

See Merger Agreement, Article XV, ¶18.2 (App., *infra*, 20a). Thus, Rayborn's claims "arise in connection with" the Merger Agreement and, according to the clear holding *Prima Paint*, must be resolved by arbitration, not judicial process.

I. *Doctor's Associates* Did Not Overrule *Prima Paint Sub Silentio.*

In its majority opinion, the Court of Appeal held that the Federal Arbitration Act governed the arbitration clause at issue. *Sun Drilling Products Corp. v. Rayborn*, 703 So.2d 818, 818 (La. Ct. App. 1997). Inexplicably, however, the Court of Appeal failed to apply (or even mention) *Prima Paint*, the seminal, dispositive, and still oft-cited case on the issue. Instead, the Court of Appeal misapplied *Doctor's Associates*, in a way fatally inconsistent with *Prima Paint*. According to the Court of Appeal, this Court held in *Doctor's Associates* that the Act permits a party to escape the operation of an arbitration clause merely by asserting generally applicable contract defenses -- such as fraud in the inducement. (App., *infra*, at 5a). This was not the holding of *Doctor's Associates*, a decision that by its own terms does not apply to this case. Thus, the Court of Appeal erred by applying *Doctor's Associates* to this case and interpreting it as having overruled *Prima Paint*.

In *Prima Paint*, this Court held that, under the Federal Arbitration Act, a binding arbitration clause, such as that found in the Merger Agreement, must be enforced unless the arbitration clause itself specifically is found to be invalid. Thus, a party may not avoid an arbitration provision merely by claiming that the entire agreement is invalid. *Prima Paint*, 388 U.S. at 406. Rather, a party seeking to avoid arbitration must contend (and ultimately prove) that the specific arbitration provision itself was coerced, obtained fraudulently, or is otherwise *void ab initio*. *Id.* This Court analyzed the split in the circuits on the issue. The United States Court of Appeals for the Second Circuit, which was affirmed by the Court, held that "a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Id.* at 402.

The decision in *Prima Paint* is good law today. No subsequent decision of this Court has disturbed the viability of *Prima Paint*. A Sheppards analysis establishes that *Prima Paint* has been cited more than 900 times. Cited ten times by this Court,[2] *Prima Paint* has never been overruled,

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[2] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Perry v. Thomas*, 482 U.S. 483 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).

criticized, or questioned in any way. *Prima Paint* has never been criticized by any of the federal courts that have relied upon it.[3]

Doctor's Associates does not alter this conclusion. In *Doctor's Associates*, this Court did not even mention *Prima Paint* -- much less overrule it. There, the issue was whether a state law may treat an arbitration clause differently than any other contract. More specifically, *Doctor's Associates* involved "whether Montana's law [invalidating arbitration clauses unless they are typed in underlined capitalized letters on the first page of the contract] is compatible with the federal [arbitration] Act." 517 U.S. at 683. This Court held that because Montana's first page requirement applied only to arbitration agreements and not contracts generally, it conflicted with the Federal Arbitration Act and was therefore invalid. *Id.*

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[3] Of the 640 federal decisions that have cited *Prima Paint*, only one federal district court opinion arguably has questioned the *Prima Paint* decision, and one opinion has purported to limit the *Prima Paint* decision. *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100, 106 (S.D.N.Y. 1995) questioned the *Prima Paint* distinction between attacks on the arbitration agreement itself and the attack on the contract as a whole, but subsequent opinions of the United States Court of Appeals for the Second Circuit continue to apply the holding of *Prima Paint*. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438 (2nd Cir. 1995) and *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126 (2nd Cir. 1997). *Three Valleys Municipal Water District v. E.F. Hutton Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991), which purports to limit *Prima Paint*, is distinguishable. In *Three Valleys*, the issue was whether a signatory to a contract that provided for binding arbitration had the authority to bind the named party. No such "authority" issue is presented here.

For instance, this Court noted its previous decisions on the issue:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Doctor's Associates, 517 U.S. at 686. (citations omitted).[4] This Court neither held nor intimated that a claim of fraud in

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[4] Thus, consistent with *Prima Paint*, this Court in *Doctor's Associates* distinguished invalidation of an arbitration *clause*, specifically, due to fraud, from a claim that the entire contract is void *ab initio* due to fraud. This Court noted that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without violating" the Federal Arbitration Act. *Doctor's Associates*, 517 U.S. at 687. This Court's use of the term "agreement" did not nullify *Prima Paint*, which mandates that general claims of fraud of the whole contract will not vitiate an arbitration clause.

Moreover, the cases relied upon in *Doctor's Associates* do not address the question presented by Sun and HHDS&P. In *Allied-Bruce*,

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the inducement of a contract must be tried rather than arbitrated.

Thus, the Court held in *Doctor's Associates* that "[c]ourts may not. . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." 517 U.S. at 687. This Court did not overrule or modify its time-tested *Prima Paint* decision.[5]

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this Court held that the wording of the Federal Arbitration Act did not restrict the Act's application and thereby allow a state to apply its arbitration law or policy to contracts affecting interstate commerce. 513 U.S. 265. In *Volt*, 489 U.S. 468, this Court held that the Act did not preempt California law which permits courts to stay arbitration pending resolution of related litigation involving third parties not bound by the arbitration agreement where the parties agreed in the contract to abide by state rules of arbitration. In *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917 (1989) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), this Court simply held that predispute agreements to arbitrate claims were enforceable. Not only do these cases not apply to our situation, but they also all upheld the enforceability of contractual arbitration clauses.

Finally, another case cited by this Court in *Doctor's Associates* is *Southland*, 465 U.S. 1. *Southland* stands for the proposition that in enacting the Federal Arbitration Act, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. *Id.* *Southland* does not deal with the issue of whether an arbitration clause is vitiated by a claim of fraud in the inducement of the contract, rather than of the arbitration provision. *Id.*

5 None of the briefs in *Doctor's Associates* focused on *Prima Paint* or the issues decided therein. No one in *Doctor's Associates* urged

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After *Doctor's Associates*, many courts have affirmed the viability of *Prima Paint*.[6] None of these several dozen cases has suggested that *Doctor's Associates* is inconsistent with *Prima Paint* or affects its holding in any way.[7] Accordingly,

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this Court to overrule or limit the validity of *Prima Paint*. *See* 1996 WL 71823 (Successful Petitioner's Brief, in which *Prima Paint* and the issue raised therein are nowhere mentioned); 1996 WL 115790 (Respondent's Brief); 1996 WL 157351 (Reply Brief); 1996 WL 115782, 75703, 75698, 78299 (*Amicus Curiae* Briefs).

[6] *See, e.g.*, *Cular v. Metropolitan Life Insurance Company, et al.*, 961 F. Supp. 550 (S.D.N.Y. Mar. 27, 1997); *Latifi v. Sousa*, 1996 WL 735260 (N.D. Ala., Dec. 23, 1996); *Capitol Vial, Inc. v. Weber Scientific*, 966 F. Supp. 1108 (M.D. Ala., June 4, 1997); *Carro Rivera v. Parade of Toys, Inc.*, 950 F. Supp. 449 (D. Puerto Rico, Dec. 23, 1996); *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 457 (2nd Cir. 1995) and *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126 (2nd Cir. 1997); *Freeman v. Minolta Business Systems, Inc.*, 699 So.2d 1182 (La. App. 2 Cir., Sept. 24, 1997); *Matter of Teleserve Systems, Inc.*, 659 N.Y.S.2d 659 (N.Y.A.D. 4 Dept., May 30,1997); *Windham Foods, Inc. v. Fleming Companies, Inc.*, 1997 WL 269387 (Ohio App. 11 Dist., May 2, 1997); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716 (Tex. App. - Fort Worth, Apr. 10, 1997); *Towe Hester & Erwin, Inc. v. Kansas City Fire & Marine Ins. Co.*, 1997 WL 656991 (Okla. Civ. App. Div., Apr. 1, 1997); *Wilharm v. M.J. Const. Co.*, 1997 WL 72138 (Ohio App. 8 Dist., Feb. 20, 1997); and *Smith v. Cumberland Group, Ltd.*, 687 A.2d 1167 (Pa. Super., Jan. 21, 1997.

[7] That *Doctor's Associates* was not seen by the lower federal courts as affecting *Prima Paint* was explicitly illustrated by *Rainbow Investments, Inc. v. Super 8 Motels, Inc.*, 973 F.Supp. 1387 (M.D.Ala.

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Prima Paint governs this case and should have been applied by the Court of Appeal.

II. The Court Of Appeal's Decision Contravenes The Letter And Spirit Of The Federal Arbitration Act And *Prima Paint* And Its Progeny.

The Federal Arbitration Act provides a means to enforce mandatory arbitration clauses in contracts which affect interstate commerce. *Southland Corp.*, 465 U.S. 1. The substantive rights afforded by the Act must be enforced by

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1997). There, the district court rejected precisely the argument Rayborn has argued.

> In this regard, Rainbow Investments is entirely mistaken when it states that "[*Allied-Bruce*] reserved the right to the Court to invalidate contracts containing arbitration clauses 'upon such grounds as exist at law or in equity for the revocation of any contract.'" In fact, as the Supreme Court reiterated in *Doctor's Assocs., Inc. v. Casarotto . . . Allied-Bruce* restated what earlier Court decisions had established: that States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' In other words, these later Court decisions are entirely in accord with the Prima Paint distinction between a challenge to a whole contract, and a challenge to an arbitration clause within a contract.

Id. at 1390 (emphasis added) (citations and quotations omitted).

both federal and state courts. *Id.* at 12. The Court of Appeal specifically held that the Act governed the arbitration clause in the Merger Agreement.[8]

The Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. The Act has created "a body of federal substantive law of arbitrability, applicable to any Arbitration Agreement within the coverage of the Act." *Id.* at 24. *See also Perry*, 482 U.S. at 489; *Allied-Bruce*, 513 U.S. 265.

Indeed, the Court of Appeal faced exactly the issue presented to this Court in *Prima Paint*: "Having determined that the contract in question is within the coverage of the [Federal] Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." *Prima Paint*, 388 U.S. at 402.

In its disregard of *Prima Paint*, the Court of Appeal's decision smacks of the "old common law hostility toward

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[8] The Louisiana trial court relied upon the Louisiana Supreme Court's decision in *George Engine Co., Inc. v. Southern Shipbuilding Corp.*, 350 So.2d 881 (La. 1977), in deciding that claims alleging fraud in the inducement of the Merger Agreement were not arbitrable. The Louisiana Court of Appeal did not rely upon *George Engine*, however, because: 1) *George Engine* interpreted the Louisiana Arbitration Act; and 2) *George Engine* was decided prior to case law which established that the Act applied in state, as well as, federal courts.

arbitration" that the Federal Arbitration Act was intended to overcome. *Southland*, 465 U.S. at 14. As this Court has observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act." *McMahon*, 482 U.S. at 226 (quotations and citations omitted).

This Court has vigilantly protected the rights of contracting parties who have agreed to settle disputes through arbitration. *See Perry*, 482 U.S. at 490-91; *McMahon*, 482 U.S. at 226; *Mitsubishi Motors*, 473 U.S. at 625-26. Indeed, Congress intended the Federal Arbitration Act to overcome certain courts' refusals to enforce agreements to arbitrate. *See Allied-Bruce*, 513 U.S. at 270 and *Volt*, 489 U.S. at 474. By enacting the Federal Arbitration Act, Congress declared a national policy favoring arbitration and curtailed state power to mandate a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. *Southland*, 465 U.S. at 10.

Contractual arbitration provisions have been used with increasing frequency in recent years. Parties find these provisions to be a useful means of contractually allocating certain risks and avoiding litigation over the proper forum for a dispute. Although a party may see the wisdom of an arbitration clause at the time of contracting, when a dispute arises that same party may be much more interested in litigating in the forum that is most favorable to that party's claim. Consequently, it is not surprising that many parties may seek to avoid contractual provisions that require arbitration.

Undoubtedly, parties will construe the Court of Appeal's panel decision in this case as presenting a broad path to circumvent an arbitration clause. Through the simple expedient of pleading a general claim of fraud in the inducement against the other contracting party, parties will drag their adversary and the court through an expensive trial, notwithstanding a contractual provision requiring arbitration.

This case illustrates how arbitration clauses can be circumvented if the Court of Appeal's decision is not corrected. In this fashion, Rayborn has sidestepped the arbitration clause and obtained a judicial proceeding for his claims, although he expressly agreed to resolve claims relating to the Merger Agreement through arbitration. This Court should not tolerate this blatant attempt to avoid a party's promise to submit disputes to arbitration. The Court should grant the writ of certiorari and clarify that arbitration clauses may not be circumvented in this manner.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

Douglas Y. Christian
Elaine T. Petrossian
REED SMITH SHAW & MCCLAY LLP
2500 One Liberty Place
Philadelphia, PA 19103
(215) 851-8256/8298

Attorneys For Petitioners

APPENDIX

SUN DRILLING
PRODUCTS CORPORATION

VS. NO. 98-CC-0278

JERRY J. RAYBORN, SR.

IN RE: Sun Drilling Products Corp.; Heller, Hickox, Dimeling et al; Astugue, Hyppolete; Reese, Susan; Heller, Douglas, P.; Hickox, George, J.; Tuten, John C.; - Plaintiff (s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 97CW-2112; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 41-857

March 13, 1998

Denied.

JPV

PFC

CDK

BJJ

JTK

Marcus, J. would grant the writ.

Lemmon, J. would grant the writ.

Traylor, J. not on panel.

Supreme Court of Louisiana
March 13, 1998

/s/
Clerk of Court
For the Court

SUN DRILLING PRODUCTS CORPORATION

VERSUS

JERRY J. RAYBORN, SR.

NO. 97-C-2122

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

ON SUPERVISORY WRIT FROM THE
25th JUDICIAL DISTRICT COURT, PLAQUEMINES
PARISH NO. 41-857, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

* * * * * * * *

WILLIAM H. BYRNES, III
JUDGE

* * * * * * * *

(Court composed of Judge Robert J. Klees and Judge William H. Byrnes, III and Judge Steven R. Plotkin)

PLOTKIN, J., CONCURS WITH REASONS

GEORGE PIVACH, II
Pivach & Pivach, L.L.C.
Belle Chasse, Louisiana
-and-
DOUGLAS Y. CHRISTIAN
ROBERT A. KAUFFMAN
MICHAEL P. WALSH
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Attorneys for Relators

PETER J. BUTLER
PETER J. BUTLER, JR.
RICHARD G. PASSLER
Breazeale, Sachse & Wilson, L.L.P.
New Orleans, Louisiana
-and-
PHILIP F. COSSICH, JR.
Cossich, Martin & Sumich, L.L.C.
Belle Chasse, Louisiana
Attorneys for Jerry J. Rayborn, Sr.

WRIT GRANTED; RELIEF DENIED

We grant writs in order to review the trial court's judgment that fraud in the inducement of a contract containing a mandatory arbitration clause is a matter to be decided by the courts of this State rather than by the arbitrator, even where the contract is subject to the Federal Arbitration Act.

This case involves a contract containing a mandatory arbitration clause. Respondent, Jerry J. Rayborn, Sr., attacked the contract in state court and among other things alleged fraud in the inducement. The trial court denied relators'[1] Exception of Lack of Subject Matter Jurisdiction

---

[1] Relators are: Sun Drilling Products Corporation, Heller, Hickox, Dimeling, Schreiber & Park; Douglas P. Heller; George K.

Continued on following page

regarding arbitration and stayed the arbitration proceedings finding that the question of fraud in the inducement is not arbitrable.

Under the Federal Arbitration Act generally applicable state law contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the Act. *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, 1655, 134 L. Ed.2d 902 (1996).

Fraud in the inducement is a generally applicable contract defense in Louisiana as distinguished from one applicable only to arbitration situations.

Arbitrations are favored. It is difficult to reconcile the decision of this Court today and the judgment of the trial court with the question raised by the trial judge:

> [W]hat is to stop anyone from making the allegation of fraud or invalidity of the contract to avoid an [arbitration] provision in the contract[?]

In spite of this concern, the trial court ruled that the question of fraud in the inducement is not arbitrable. We share the concern of the trial judge, but like the trial judge are compelled to reach the same result in face of the position

---

Continued from previous page

Hickox; William R. Dimeling; Richard R. Schreiber; Steven J. Park; John C. Luten; Hyppolete J. Astugue; and Susan Reese.

taken by the U.S. Supreme Court in *Doctors Associates, Inc.*, supra.

The result reached by this Court is also consistent with the reasoning of the Louisiana Supreme Court in *George Engine, Co., Inc. v. Southern Shipbuilding Corp.*, 350 So.2d 881 (La. 1977). However, *George Engine* did not involve the Federal Arbitration Act.

Moreover, this Court in dicta in *Mt. Airy Refining Co. v. Clark Acquisition, Inc.*, 470 So.2d 890, 892 (La. App. 4 Cir.), *writ denied* 476 So.2d 351 (La. 1985) noted that in Louisiana under *George Engine* the appellant, Clark Acquisition, Inc., "could have filed in court a motion to stay the arbitration proceeding along with a petition to rescind the contract for fraudulent inducement."

George Engine was followed most recently in *Ackel v. Ackel*, 97-70 p. 5 (La. App. 5 Cir. 5/28/97); 696 So.2d 140, 143.

As the policy resolving the question of fraud in the inducement in court rather than through arbitration as originally declared by *George Engine* appears to continue to be the policy of this state; and as *Doctors Associates* permits the application of this policy; therefore, we are constrained to affirm the actions of the trial court regardless of our concerns about the potential havoc this policy could play with arbitration clauses in Louisiana. In that regard we take some comfort in the fact that *George Engine* was decided twenty years ago, and if the paucity of cases in our jurisprudent is any indication, the potential for abuse of the arbitration process noted by the trial judge has never been realized. However, as the use of alternative dispute resolution methods, including arbitration, is assuming ever increasing

prominence in Louisiana and elsewhere, the Louisiana Supreme Court may wish to revisit *George Engine* at this time. The *George Engine* court referred to "a natural reluctance to surrender the historical jurisdiction of courts," a reluctance that no longer exists. We also wish to call to the attention of the Supreme Court the apparent conflict between the above cited Fifth Circuit *Ackel* decision and *Freeman v. Minolta*, 29655 p. 13 (La. Ap. 2 Cir. 9/24/97); 699 So.2d 1182, 1189, where the Second Circuit stated:

> Federal jurisprudence holds that if the claim is fraud in the inducement of the arbitration clause itself, an issue as to the "making" of the agreement to arbitrate, the federal court may proceed to adjudicate it. However, the statutory language does not permit the federal court to consider claims in the inducement of the contract generally.

Ackel took the contrary position stating that:

> The presence of an arbitration clause in a contract does not divest the district court of jurisdiction to determine the underlying contract's validity.

Ackel, p.6, 696 So.2d at 143-144.

We admit to some skepticism at the attempt by the Second Circuit in *Freeman* to draw a distinction between fraud in the inducement of the arbitration clause and fraud in the inducement of the contract generally. Although it is a distinction that is not original to *Freeman* as may be seen by referrence [sic] to the authorities cited therein, it strikes this court as being an overly fine distinction. As the Louisiana

Supreme Court stated in *George Engine*, the enforcement of the right to arbitration "presupposes the existence of a valid contract as a basis for invoking arbitration." If arbitration is the desired outcome, it would be better to face the issue head-on and hold outright that the question of arbitration is arbitrable because public policy today so favors arbitration and the alternative is open to so much abuse, than to draw what seems to be a distinction without a difference or a sound basis in reason. In response to *Freeman* a clever lawyer should not find it too difficult to frame his pleadings in terms of fraudulent inducement in the arbitration clause rather than fraudulent inducement in the contract as a whole.

For the foregoing reasons the judgment of the trial court denying relator's Exception of Lack of subject Matter Jurisdiction and granting respondent's Motion to Stay Arbitration is affirmed.

WRIT GRANTED; RELIEF DENIED

SUN DRILLING PRODUCTS CORPORATION * NO. 97-C-2122

* COURT OF APPEAL

VERSUS

* FOURTH CIRCUIT

JERRY J. RAYBORN, SR.

* STATE OF LOUISIANA

* * * * * * * *

PLOTKIN, J. CONCURRING WITH WRITTEN REASONS:

I respectfully concur in the majority's decision holding that the issue of fraud in inducement of a contract containing a mandatory arbitration clause may be decided by a Louisiana state court. Under the most recent jurisprudence from the United States Supreme Court and from Louisiana courts, the issue of fraud in the inducement of the contract is not subject to the mandatory arbitration requirement.

The Federal Arbitration Act, which applies to the contract at issue in the instant case because the contract affects interstate commerce, provides, in pertinent part, as follows:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any party thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2. In the most recent United States Supreme Court case on this issue, the court interpreted the above provision as follows:

> In *Southland [Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)], we held that § 2 of the FAA applies in state as well as federal courts, see 465 I/S/. at 12, 104 S. Ct., at 859, and "withdr[aws] the power of the states to require a judicial form for the resolution of claims which the contracting parties agreed to resolve by arbitration." *id.* at 10, 104 S.Ct., at 858. We noted int [sic] he [sic] pathmarking *Southland* decision that the FAA established a "broad principle of enforceability," *id.*, at 11, 104 S.Ct., at 858, and that § 2 of the federal Act provided for revocation of arbitration agreements only upon "grounds as exist at law or in equity for the revocation of any contract." In *Perry [v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)], we reiterated: "[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Doctor's Associates Inc. v. Casarotto, 116 S.Ct. 1652, 1655 (1996). Thus, under the rule enunciated by the *Doctor's Associates* case, state courts may decide allegations that a contract is invalid, revocable, or unenforceable under state law; such issues are not required to be submitted to arbitration.

As the majority notes, the rule enunciated in *Doctor's Associates* is consistent with the Louisiana Supreme Court's

most recent case on this issue, *George Engine, Co. v. Southern Shipbuilding Corp.*, 350 So. 2d 881 (La. 1977), which allowed a party to sue to rescind a contract containing an arbitration clause on the grounds that the contract was void *ab initio* in a court of competent jurisdiction. That rule was also followed in *Ackel v. Ackel*, 97-70 (La. App. 4 Cir. 5/28/97), 696 So. 2d 140, 143. *See also Mt. Airy Refining Co. v. Clark Acquisition, Inc.*, 470 So. 2d 890, 892 (La. App. 4th Cir.), *writ denied*, 476 So. 2d 351 (La. 1985).

The relator in the instant case argues for the application of a federal rule which distinguishes between a claim of fraud in the inducement of an arbitration clause itself and fraud in the inducement of the contract, allowing a federal court to hear a claim alleging fraud in the inducement of an arbitration clause, but requiring a claim alleging fraud in the inducement of the contract itself to be decided by an arbitrator. That rule was followed in *Freeman v. Minolta Business Systems*, 618, 29, 655 (La. App. 2 Cir. 9/24/97), 699 So. 2d 1182, 1189, which in turn relied on a 1967 United States Supreme Court case, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). However, under the more recent United States Supreme Court decision, as well as the most recent Louisiana Supreme Court decision, state law, as opposed to federal law, may be applied to this case. Thus, I agree with the majority's decisions to distinguish the *Freeman* case.

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, _____

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

SUN DRILLING PRODUCTS CORP. v. RAYBORN, SR.

No. 97-C-2112

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

25TH JUDICIAL DISTRICT COURT PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 41-857 DIVISION "B"

SUN DRILLING PRODUCTS CORPORATION

VERSUS

JERRY J. RAYBORN, SR.

FILED: AUG 22 1997 /s/ BETTINA K. PHILLIPS
DEPUTY CLERK

JUDGMENT

On August 21, 1997, this matter came on for hearing on the following:

1. Exception of Lack of Subject Matter Jurisdiction filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese.

2. Exception of No Cause of Action filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese.

3. Exception of Failure to Join Indispensable Party filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K.

Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese.

4. Motion to Stay Arbitration filed by Jerry J. Rayborn, Sr.

5. Motion to Compel Discovery Responses and for Sanctions (first set of discovery) filed by Jerry J. Rayborn, Sr.

6. Motion to Compel Discovery (second set of discovery) filed by Jerry J. Rayborn, Sr.

7. Motion for Protective Order and Amended Motion for Protective Order filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese.

Present were:

Peter J. Butler, Richard G. Passler, Philip F. Cossich, Jr., and Les A. Martin, counsel for Jerry J. Rayborn, Sr.

Robert Kaufman [sic], Douglas Y. Christian and George Pivach, II, counsel for Sun Drilling Products Corporation, Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese.

Edward D. Wegmann, co-counsel for Hyppolete J. Astugue and Susan Reese.

Considering the pleadings, memorandum, the arguments of counsel and the entire record of this proceeding, for the reasons orally assigned:

IT IS ORDERED that the Exception of Lack of Subject Matter Jurisdiction filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese, be and is hereby OVERRULED;

IT IS FURTHER ORDERED that the Exception of No Cause of Action filed by Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten and Hyppolete J. Astugue, be and is hereby OVERRULED;

IT IS FURTHER ORDERED that the Exception of No Cause of Action filed by Susan Reese is hereby GRANTED, and Jerry j. Rayborn, Sr. is given fifteen (15) days to amend his Reconventional Demand against Susan Reese.

IT IS FURTHER ORDERED that the Exception of Failure to Join and Indispensable Party is hereby GRANTED, and Jerry J. Rayborn, Sr. shall have fifteen (15) days to join Jerry J. Rayborn, Jr., Jeffrey Rayborn, and Joel Rayborn to this lawsuit.

IT IS FURTHER ORDERED that the Motion to Stay Arbitration filed by Jerry J. Rayborn, Sr. be and the same is hereby GRANTED and Arbitration No. 14 180 00245 97 V/J entitled "Sun Drilling Products Corporation and Heller, Hickox, Dimeling, Schreiber & Park and Jerry J. Rayborn, Sr., Jerry J. Rayborn, Jr., Jeffrey Rayborn and Joel Rayborn" pending before the American Arbitration Association in Philadelphia, Pennsylvania be and is hereby STAYED pending further orders of this Court and the parties thereto be and are hereby precluded from taking any action or otherwise participating in any manner in said arbitration pending further orders of this Court;

IT IS FURTHER ORDERED that the Motion to Compel Discovery Responses and for Sanctions (first set of

discovery) filed by Jerry j. Rayborn, Sr. and the Motion to Compel Discovery (second set of discovery) filed by Jerry j. Rayborn, Sr. be and are hereby GRANTED and Sun Drilling Productions [sic] Corporation; Heller, Hickox, Dimeling, Schreiber & Park; Douglas B. Heller; George K. Hickox; William R. Dimeling; Richard R. Schreiber; Stephen G. Park; John C. Tuten; Hyppolete J. Astugue and Susan Reese be and are hereby required to fully and completely respond to all of the discovery at issue in said Motions, within thirty (30) days and for all documents which a privilege is claimed, a privilege log shall be provided which shall include the authors(s), recipient(s), sender(s) and dates(s) [sic], a description of the nature and subject matter of the document; and the basis for the claim of privilege;

IT IS FURTHER ORDERED that the Motion for Protective Order and Amended Motion for Protective Order is DENIED.

Judgment rendered this 21st day of August, 1997.

Judgment signed this ____ day of Aug 22 1997, 1997, Point-a-la-Hache, Louisiana

/s/
JUDGE

A TRUE COPY

/s/
Dy. clerk of Court
Parish of Plaquemines, La.

AGREEMENT

By and Among

JERRY J. RAYBORN, SR., JERRY J. RAYBORN, JR., JEFFREY RAYBORN, JOEL RAYBORN,

SUN DRILLING PRODUCTS CORPORATION, A LOUISIANA CORPORATION,

HELLER, HICKOX, DIMELING, SCHREIBER & PARK

And

SUN ACQUISITION CORPORATION

December 8, 1994

AGREEMENT

THIS AGREEMENT, made this 8th day of December, 1994, by and among JERRY J. RAYBORN, SR., JERRY J. RAYBORN, JR., JEFFREY RAYBORN, JOEL RAYBORN (Jerry J, J. Rayborn, Sr., Jerry j. Rayborn, Jr., Jeffrey Rayborn, Joel Rayborn collectively referred to as the "Company Shareholders"; Jerry j. Rayborn, Sr. sometimes individually referred to herein as "Exchange Agent"), SUN DRILLING PRODUCTS CORPORATION, a Louisiana corporation ("Company"), HELLER, HICKOX, DIMELING, SCHREIBER & PARK, a Pennsylvania general partnership ("HHDS&P"), and SUN ACQUISITION CORPORATION, a Louisiana corporation ("Sun Acquisition"; HHDS&P and Sun Acquisition are collectively referred to herein as "Buyer").

WITNESSETH:

WHEREAS, the partners of HHDS&P or their affiliates own 100% of the issued and outstanding stock of Sun Acquisition; and

WHEREAS, the respective Shareholders and Boards of Directors of Sun Acquisition and Company have each approved the merger of Sun Acquisition with and into Company, with Company as the surviving corporation, upon the terms and conditions set forth herein and in the Plan of Merger attached hereto as Exhibit A (the "Plan of Merger"), and have approved this Agreement (the "Agreement") and the Plan of Merger; and

WHEREAS, in accordance with the terms of the Plan of Merger, it is proposed that Sun Acquisition be merged with and into Company and that the presently issued and outstanding shares of capital stock, par value $10.00 per share of Company be converted into cash; and

WHEREAS, Company and Buyer desire to enter into and carry out the transactions contemplated by this Agreement in

accordance with the terms hereof, the Plan of merger and the provisions of the Louisiana Business Corporation Law.

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants and agreements set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the parties hereto agree as follows:

ARTICLE I
The Merger

1.1 The merger of Sun Acquisition into Company. Subject to the terms and upon the conditions set forth herein, on or

* * * *

Each party to this Agreement agrees to cooperate fully with the other parties hereto and their counsel and accountants and other representatives, will use best efforts to cause satisfaction of the conditions to consummation of the Merger as promptly as possible, and will refrain from a course of action inconsistent with this Agreement of the Plan of Merger. Each party shall, upon request of any of the other parties hereto, at any time and from time to time execute, acknowledge, deliver and perform all such further acts, deeds, assignments, transfers, conveyances, powers of attorney and instruments of further assurances as may be reasonably necessary or appropriate to carry out the provisions and intent of this Agreement or the Plan of Merger.

ARTICLE XVIII
Miscellaneous

18.1 Dispute Resolution.

(a) This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania without regard to any jurisdiction's conflicts of laws provisions.

(b) All disputes arising in connection with this Agreement shall be finally settled under the rules and regulations of the American Arbitration Association and judgment upon any award rendered by the arbitration panel may be entered in any court having jurisdiction thereof. The arbitration panel shall be composed of one arbitrator chosen by Buyer, one arbitrator chosen by Jerry J. Rayborn, Sr., and an umpire chosen by the two arbitrators. The arbitration will be conducted in Philadelphia, Pennsylvania. If either party fails to select an arbitrator (a "defaulting party") within 30 days of receipt of written notice of a dispute from the other party including a demand that the party select an arbitrator, the defaulting party shall be deemed to have agreed with the non-defaulting party's interpretation of the dispute.

18.2 Counterparts/Use of Facsimiles. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute a single agreement. The reproduction of signatures by means of a telecopying device shall be treated as though such reproductions are executed originals and each party hereto covenants and agrees to provide the other parties with a copy of this Agreement bearing original signatures within five days following transmittal by facsimile.

18.3 Entire Agreement. This Agreement constitutes the entire agreement of the parties hereto respecting its subject matter and supersedes all negotiations, preliminary agreements and prior or contemporaneous discussions and understandings of the parties hereto in connection with the subject matter hereof.

* * * *

IN WITNESS WHEREOF, each of the parties has executed or caused this Agreement to be executed where applicable by its duly authorized officer and has caused its corporate seal or stamp to be affixed hereto and attested by its Secretary or Assistant Secretary or other authorized person, as of the date first above written.

WITNESS:

/s/ David N. Corken

/s/ Jerry J. Rayborn, Sr.
JERRY J. RAYBORN, SR.

WITNESS:

/s/ David N. Corken

/s/ Jerry J. Rayborn, Jr.
JERRY J. RAYBORN, JR.*

WITNESS:

/s/ David N. Corken

/s/ Jeffrey Rayborn
JEFFREY RAYBORN*

WITNESS:

/s/ David N. Corken

/s/ Joel Rayborn
JOEL RAYBORN*

ATTEST:

SUN DRILLING PRODUCTS CORPORATION, a Louisiana corporation

/s/ H. Astugue

By /s/ Jerry J. Rayborn, Sr.
President

WITNESS:

HELLER, HICKOX, DIMELING, SCHREIBER & PARK

/s/ Jerry J. Rayborn, Sr.
* By Jerry J. Rayborn, Sr., agent and attorney-in-fact

/s/ Lisa Ciandra

By /s/ D P. Heller
General Partner

ATTEST:

Sun Acquisition Corporation, a Louisiana corporation

/s/ G. K. Hickox

By /s/ D. P. Heller
President

Supreme Court, U.S.
FILED
JUL 9 1998
OFFICE OF THE CLERK

No. 97-1993

In The

Supreme Court of the United States

October Term, 1997

SUN DRILLING PRODUCTS CORPORATION, HELLER, HICKOX, DIMELING, SCHREIBER AND PARK, DOUGLAS P. HELLER, GEORGE K. HICKOX, JR., WILLIAM R. DIMELING, RICHARD R. SCHREIBER, STEVEN J. PARK, JOHN C. TUTEN, HYPPOLETE ASTUGUE AND SUSAN REESE,

Petitioners,

v.

JERRY J. RAYBORN, SR.,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETER J. BUTLER*
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent Jerry J. Rayborn, Sr. respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Louisiana Court of Appeal for the Fourth Circuit's decision which declined to disturb the decision of the Louisiana state district court which refused the petitioners' request that it decline to exercise subject matter jurisdiction over only a few of the interrelated claims in this litigation initiated by one of the petitioners.

I. STATEMENT OF THE CASE

On December 8, 1994, a contract known as the Merger Agreement was executed by Jerry J. Rayborn ("Rayborn") and the petitioner Heller, Hickox, Dimeling, Schreiber and Park ("HHDS&P"). The Merger Agreement provided the blueprint for the sale of the majority interest in petitioner Sun Drilling Products Corporation ("Sun").

On February 21, 1995, the instruments required by the Merger Agreement to consummate the sale of the majority interest in Sun (the "Transaction") were executed by Rayborn and the individual petitioners who were actually acquiring the majority interest in Sun. Those individual petitioners are Douglas Heller, George Hickox, Jr., William Dimeling, Richard Schreiber, Steven Park and John Tuten (collectively, the "Acquirers").

The instruments consummating the Transaction are numerous and lengthy. See, index to the instruments making up the Transaction (App., *infra*, 1a-6a).

On March 17, 1997, Sun filed an action against Rayborn in Louisiana state court (the "Petition") relating to one of the instruments executed in the Transaction; specifically, the Management, Technical Services and Royalty Agreement ("Royalty Agreement").

On May 1, 1997, Rayborn responded to Sun's action by filing a Reconventional [counterclaim] and Third Party Demand ("Rayborn's Response"). The claims set forth in Rayborn's Response include compulsory counterclaims.

Rayborn's Response asserts claims to rescind the Transaction. The rescission claims were brought against those petitioners who were parties to the Transaction – that is, the Acquirers.

Rayborn's Response also asserts other claims against the Acquirers as well as against the petitioners who were not parties to the Transaction; specifically, Hyppolete Astugue, Sun's president and chief executive officer, and Susan Reese, Sun's corporate secretary and Astugue's executive assistant.

Rayborn's Response sets forth the following claims:

I – Recision Based Upon Vitiated Consent;

II – Failure of Cause;

III – Fraud;

IV – Conspiracy to Commit Fraud;

V – Breach of Fiduciary Duty;

VI – Conspiracy for Breach of Fiduciary Duty;

VII – Breach of Contract;

VIII – Conspiracy to Breach Contract;

IX – Louisiana Unfair Trade Practices and Consumer Protection Law;

X – Conspiracy for Violation of Louisiana Unfair Trade Practices and Consumer Protection Law;

XI – Tortious Interference with Contract;

XII – Conspiracy for Tortious Interference with Contract;

XIII – Violation of Article 2315 of the Louisiana Civil Code;

XIV – Conspiracy to Violate Article 2315 of the Louisiana Civil Code;

XV – Reinstatement of Royalty Agreement;

XVI – Mental and Emotional Pain and Suffering and Humiliation and Anxiety;

XVII – Conspiracy to Obstruct Rayborn from Discharging His Duties as an Officer and Director of New Sun and to Prevent Rayborn from Communicating with Other Officers and Employees of New Sun; and

XVIII – Damage to Reputation.

The petitioners then sought to have the Louisiana state district court decline to exercise subject matter jurisdiction as to Counts I-II and VII-XII of Rayborn's Response, arguing that those Counts were required to be arbitrated.

The Louisiana state district court denied the petitioners request on several basis: (1) arbitration was not

applicable; (2) arbitration had been waived; (3) arbitration would not resolve the disputes between the parties; and (4) regardless of the Counts sought to be arbitrated, the other Counts in Rayborn's Response remained to be tried.

The Louisiana Court of Appeal for the Fourth Circuit refused to disturb the ruling of the Louisiana state district court. *Sun Drilling Products Corp. v. Rayborn*, 703 So.2d 818 (La. App. 4th Cir. 1997), *writ denied*, ___ So.2d ___ (La. 1998).

The Louisiana Supreme Court declined to consider the decision below, responding to the petitioners' request by stating: "Denied." Thus, it is unknown on what basis the Louisiana Supreme Court made its decision.

II. REASONS WHY THE PETITION SHOULD BE DENIED.

The petition does not warrant review by this Court. The decision below was based upon the particular facts and circumstances in this matter which rendered arbitration inappropriate. Grounds independent from those set forth in the petition exist for the basis of the decision below. Respondent urges this Court not to waste its resources on a case that does not present any compelling reasons for review. Enough of this Court's resources have already been expended in this matter in connection with the June 25, 1998 denial of the petitioners' application for a stay pending disposition of the petition. Further, granting the petition will have no impact on litigants in general and will not clarify the law.

A. The Merger Agreement (and any arbitration clause therein) is inapplicable now that the instruments required for the Transaction have been executed.

The Merger Agreement set the agenda for the execution of the other instruments necessary to consummate the Transaction. The Merger Agreement, however, is not applicable in this case because it is those later documents executed by the Acquirers which actually consummated the Transaction. It is the Transaction which is being sought to be rescinded by Rayborn as part of his response to this Sun initiated litigation.

The situation is similar to the purchase of a new home by an individual. Initially, that person executes an Agreement to Purchase the home. Later a Contract of Sale is executed for the home in which the purchase actually takes place. Once the Contract of Sale is executed, the Agreement to Purchase would no longer be relevant to an action to rescind the sale on the home. Instead, any subsequent action to rescind the sale of the home would have to be based upon the Contract of Sale. If the Agreement to Purchase contained an arbitration clause, it would be inapplicable to an action to rescind the sale of the home.

The same is true in this case. Rayborn seeks, *inter alia*, a rescission of the Transaction. While the Merger Agreement identifying all of the instruments that would be executed by the parties in order to consummate the Transaction (like an Agreement to Purchase) set up the sale, it is those later executed documents such as the Royalty Agreement sued upon by Sun (like a Contract of

Sale) which actually consummated the Transaction. Thus, any arbitration clause in the Merger Agreement cannot be applicable in this case. See, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924-25 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. . . . [Any other rule] might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.").

If prior to the execution of the instruments making up the Transaction there had there been a dispute concerning the Merger Agreement, then any arbitration clause that might exist in the Merger Agreement may have been applicable. The parties, however, are now one step removed from the Merger Agreement in that the parties have executed the instruments necessary to consummate the Transaction. Therefore, any arbitration clause in the Merger Agreement is inapplicable in this case.

B. If any arbitration clause in the Merger Agreement were applicable, its application has been waived.

This lawsuit was initiated by the petitioner Sun – not Rayborn. Thus, Sun judicially acknowledged that any right to arbitration which may previously have existed was no longer applicable.

Further, the agreements which make up the Transaction are all inter-related documents, each relying upon and consideration for each other. For example, the WHEREAS provisions of the Royalty Agreement (upon which this litigation was initiated by petitioner Sun) provides:

> WHEREAS, SDP, Heller Hickox Dimeling Schreiber and Park, a Pennsylvania general partnership, and Sun Acquisition Corporation, a Louisiana corporation ("Acquisition"), have entered into that certain Agreement dated December 8, 1994 (as amended, the "Merger Agreement"), pursuant to which Acquisition will merge with and into SDP and SDP will be the surviving corporation (the "Merger"); and
>
> * * *
>
> WHEREAS, as a condition to the Merger, Heller, Hickox, Dimeling, Schreiber and Park and Acquisition require that JJR be retained as an employee of SDP after the effective date of the Merger and that JJR be required to enter into this Agreement; and
>
> * * *
>
> WHEREAS, JJR and SDP desire to enter into a management, technical services and royalty

> agreement effective as of the date of this Agreement.
>
> NOW, THEREFORE, in consideration of the premises, mutual covenants and agreements contained herein, and for the good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows . . . :

See, excerpts from the Royalty Agreement (App., *infra*, 7a-8a). Thus, when Sun filed an action against Rayborn in Louisiana state court relating to one of the instruments executed in the Transaction (i.e., the Royalty Agreement), whatever right to arbitration which may have existed was waived.

In explaining his reasons for denying the petitioners' request to have certain of Rayborn's claims against the petitioners determined by arbitration, the Louisiana trial court recognized this waiver, stating:

> But, as Mr. Butler pointed out, the initial contract containing the arbitration provisions creates in effect all of the other contractual relationships between the parties, including the ones sued upon in Case No. 41-857 of the document in this court. Sun Drilling sought protection of this court and sought to have a contractual provision rescinded and a contractual relationship between it and Jerry Rayborn, Sr. terminated judicially, but now when the other aspects of their relationship are brought at issue, not in a separate suit, but in a Reconventional Demand [counterclaim] to that initial suit and now they seek the protection of that contract in terms of the requirement of arbitration.

See, Excerpts from Transcript of August 21, 1997 hearing before the Louisiana state district court (App., *infra*, 11a).

C. If any arbitration clause in the Merger Agreement were applicable, Rayborn may sue to rescind it on the basis that it is void *ab initio*.

The Louisiana Supreme Court has held that a party to a contract containing an arbitration clause can sue to rescind that contract in a court of competent jurisdiction on the grounds that it was void *ab initio*. *George Engine Co. v. Southern Shipbuilders Corp.*, 350 So.2d 881 (La. 1977).

In *George Engine*, the parties entered into several contracts to construct three vessels, one of which contained an arbitration clause. George Engine sued in a Louisiana state district court to rescind the contract on the ground that it was void *ab initio* because of a vice of consent through error, misrepresentation, and coercion on the part of Southern Shipbuilding at the time of the confection of the contract. Southern Shipbuilding filed a motion to stay the court proceedings, which the trial court granted, ordering George Engine to proceed to arbitration. On a writ application to the Louisiana Supreme Court to review the ruling of the trial court, the Louisiana Supreme Court stated: "The issue thus presented is whether a party to a contract containing an arbitration clause may sue to rescind that contract in a court of competent jurisdiction on the ground that it is, and was, void *ab initio*." 350 So.2d at 884.

Initially, the Louisiana Supreme Court recognized that the pertinent section of the Louisiana Arbitration

Act, La. R.S. 9:4201, presupposes the existence of a valid contract as a basis for invoking arbitration, providing:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time the agreement to submit, shall be valid, irrevocable, and enforceable, **save upon such grounds as existing law or in equity for the revocation of any contract.**

La. R.S. 9:4201 (emphasis added).

One such ground recognized by the Louisiana Supreme Court was a contract being void *ab initio*. The Louisiana Supreme Court reasoned that it "**[i]t would be an absurdity to compel arbitration of the conditions in a contract which does not exist in its entirety in legal contemplation.**" *George Engine*, 350 So.2d at 884 (emphasis added).

The Louisiana Supreme Court further explained:

> This Court's jurisdiction cannot be displaced whenever a contract contains an arbitration clause. The arbitration law and arbitration clauses in contracts do not vest in arbitrators the historic jurisdiction of the courts to determine fraud or duress in the inception of a contract. It may be said that courts are far better qualified to decide issues of this kind.
>
> * * *
>
> Nor does Section 4201 of the Arbitration Act compel arbitration of a question involving the

> validity *ab initio* of a contract containing an arbitration clause. While provisions for arbitration of controversies arising out of contracts are declared to be valid, irrevocable and enforceable, validity, irrevocability and enforceability are by the terms of Section 4201 made dependent upon 'such grounds as exist at law or in equity for the revocation of any contract.' *Stone v. Stone*, 292 So.2d 686 (La. 1974). By its very terms Section 4201 presupposes the existence of a valid contract as a basis for invoking arbitration.

Id. at 884.

In *George Engine*, the Louisiana Supreme Court found that: "[t]he case at bar involves the legal issue of the validity in its inception of the contract itself, based on the alleged lack of valid consent." 350 So.2d at 885. The Louisiana Supreme Court further explained:

> **Lack of consent, of course, is one of the grounds for revoking a contract. It is a vice which rescinds the contract from its inception. Consequently, without valid consent there is no contract** to be arbitrated. Surely a court would not be expected to compel arbitration of the conditions in a contract which does not exist in legal contemplation. Here the validity of the entire contract of which the arbitration is part is called into question by George. If the agreement lacked the valid consent of George it cannot be said that George 'voluntarily' waived its right to have the court determine whether the agreement should be rescinded and declared void *ab initio*.

Id. (emphasis added).

The issue faced by the Court in *George Engine* – that is, "the legal issue of the validity in its inception of the contract itself, based on the alleged lack of valid consent," 350 So.2d 885 – was the identical issue faced in the instant case. Further, the arbitration clause at issue in *George Engine* is substantially similar to the one at issue in the instant case. In *George Engine*, the Louisiana Supreme Court reviewed the arbitration clause at issue and found that it "evinces no intent of the parties to specifically arbitrate the issue of error in the inducement of the agreement; nor is the language in the agreement broad enough to comprehend arbitration of that issue." 350 So.2d 884. The same is true in the instant case.

The petitioners argue, based upon *Prima Paint Corp. v. Flood & Concklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801 (1967), that the Federal Arbitration Act (9 U.S.C. §§ 1-14) compels arbitration of this case. The defendant in *George Engine* also relied upon the *Prima Paint* case; however, its application was expressly rejected therein by the Louisiana Supreme Court. 350 So.2d at 886.

One of the reasons given by the Louisiana Supreme Court in *George Engine* for rejecting *Prima Paint* was that it was state statutory law to be interpreted in the case. As in *George Engine*, it is also state statutory law (i.e., fraud as a vice of consent) which is being interpreted in this case.

In *George Engine*, the Louisiana Supreme Court further recognized that it was the public policy of the State of Louisiana to permit parties to a contract to be able to judicially challenge a contract, **including but not limited** to one containing an arbitration provision, on the grounds that the contract itself is void *ab initio*, holding:

> Aside from a natural reluctance to surrender the historical jurisdiction of courts to decide the legal issue presented by a petition to rescind a contract on account of error in its inducement, arbitrators are designated to arbitrate and resolve factual controversies arising out of valid contracts between the parties. They need not be lawyers and in all probability are wholly unqualified to decide legal issues. Indeed, they are not bound to apply the law. Arbitration, moreover, deprives a party of a jury trial and the right to appeal, substantial rights which should not be denied unless voluntarily and knowingly waived. It was in all probability to preserve these rights and to limit arbitration within proper bounds that the Legislature created an exception to the enforceability of arbitration provisions in contract where "grounds . . . exist at law or in equity for the revocation of any contract". La. Rev. Stat. 9:4201.

George Engine, 350 So.2d at 885.

Not uncoincidently, Section 2 of the Federal Arbitration Act is substantially similar to Section 4201 of the Louisiana Arbitration Act, providing:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract**.

9 U.S.C. § 2 (emphasis added). Thus, both the Louisiana Arbitration Act and the Federal Arbitration Act presuppose the existence of a valid contract as a basis for invoking arbitration as they both contain the same language providing: "save upon such grounds as existing at law or in equity for the revocation of any contract."

The latest pronouncement of this Court as to the applicability of the Federal Arbitration Act in this case supports the decision of the Louisiana Supreme Court in *George Engine*. In that case, this Court explained:

> In *Allied-Bruce [Terminix-Cos. v. Dobson* 513 U.S. 265, 115 S. Ct. 834 (1995)] we restated what our decisions in *Southland* [*Corp v. Keating*, 465 U.S. 1, 104 S. Ct. 852 (1984)] and *Perry* [*v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987)] had established:
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> > "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent."

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 685-86, 116 S. Ct. 1652, 1655 (1996) (quoting *Allied-Bruce Terminix*

Cos. v. Dobson, 115 S. Ct. 834, 843 (1995) (emphasis in original)).

This Court then went on to explain that:

> the text of § 2 [of the Federal Arbitration Act] declares that state law may be applied "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.

Doctor's Associates, 517 U.S. at 686-87, 116 S. Ct. at 1656 (citations omitted) (emphasis in original).

Thus, what the Federal Arbitration Act actually precludes is "invalidat[ing] arbitration agreements under state laws applicable *only* to arbitration provisions." *Id.* at 687, 116 S. Ct. at 1656 (emphasis in original). In other words, states are only precluded "from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' " *Id.* (citations omitted.) In the instant case, the Louisiana state laws sought to be applied include generally applicable contract defenses such as fraud and, thus, the Federal Arbitration Act is inapplicable.

D. Arbitration could only delay final resolution of this dispute and adversely impact the parties.

In explaining his reasons for ruling, the Louisiana state district court recognized that arbitration in this case

would have little (if any) impact on what would be tried before him:

> I am convinced that arbitration in this context, in the context of the litigation that is presented to this court, is obviously very complicated; obviously multi-faceted and involving a number of contractual relationships between these parties, would in fact lend little to the Court in terms of dispute resolution. It would resolve very little. It would be fruitless, pointless and the only issue that might be resolved by arbitration can be resolved by this Court in the context of the presentation of evidence and witnesses, which would proceed in the context of all of the claims between the parties.
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> * * *
>
> . . . I am going to proceed as if this litigation were going to proceed with or without the [Louisiana Court of Appeal for the] Fourth Circuit's interference. Additionally, there are other issues in this litigation that need not be stayed whether I am right or wrong.

See, Excerpts from Transcript (App., *infra*, 12a-14a).

The normal advantage which arbitration provides – speedy resolution of disputes – will not occur in this case if arbitration were required. To the contrary, arbitration would delay the ultimate resolution of the disputes between the parties. Discovery, which was initiated by the petitioners, is virtually complete. The trial of this matter is set for July 20, 1998. The trial court informed counsel for the parties that this is the only matter that will be set for trial on that date. A final resolution of *all* disputes between the parties will occur at that time.

Moreover, Rayborn would be prejudiced if the petitioners were permitted to arbitrate a mere portion of this multi-faceted litigation in Philadelphia, Pennsylvania. As recognized by the Louisiana state trial court in its Reasons for Judgment (quoted above) arbitration would not advance the resolution of this dispute because most of this lawsuit would not be arbitrated and would remain ongoing before the Louisiana state court. Thus, regardless of any outcome in arbitration, the parties would continue to expend resources in litigation because a trial will occur. Further, the facts underlying Rayborn's defense to this Sun-initiated litigation are substantially similar to those portions of Rayborn's Response on which the petitioners sought arbitration. Therefore, arbitration will only needlessly delay a resolution of not only the matters sought to be arbitrated by the petitioners, but also of those matters which the petitioners acknowledge cannot possibly be subject to arbitration and of the matters brought at issue by the litigation initiated by them.

E. The petitioners' only seek to arbitrate a small portion of this lawsuit.

The pleadings filed by the petitioners in the Louisiana state trial court seeking arbitration was not directed towards the entirety of Rayborn's claims against them. See, Excerpts from Transcript (App., *infra*, 13a) ("Therefore and for those reasons the Exceptions of Lack of Subject Matter Jurisdiction as to Counts I, II, VII, VIII, IX, X, XI and XII of the Reconventional Demand [Case No.] 41-857 are denied.").

In the Application for Writ filed in the Louisiana Supreme Court, the petitioners expanded their argument as to what could be arbitrated to Counts I-IV and IX-XII of Rayborn's Response. Thus, even the petitioners acknowledge that there will be a trial in the Louisiana state district on over one-half (i.e., ten out of eighteen) of the Counts set forth in Rayborn's Response.

Counts III and IV of Rayborn's Response, however, were not at issue before the Louisiana state trial court and, accordingly, were not an issue before the Louisiana Supreme Court. Thus, those Counts cannot be at issue in this Court.

Similarly, because Counts VII and VIII of Rayborn's Response (which were at issue in the Louisiana state trial court) were not a part of the petitioners' Application for Writ in the Louisiana Supreme Court, they too were not at issue before that Court. Thus, those Counts cannot be at issue in this Court.

Regardless, even if Counts VII and VIII had been before the Louisiana Supreme Court, those Counts could not be subject to arbitration even under the petitioners' arguments. Those Counts relate to claims relating to breaches of contract. One of those contracts at issue in those Counts is the Royalty Agreement sued upon which initiated this action and the petitioners acknowledge that disputes relating to that instrument are not subject to arbitration.

Similarly, even the entirety of Counts IX-XII of Rayborn's Response cannot be subject to arbitration under the petitioners' argument. Counts IX and X, which

relate to the Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51;1401, *et seq.*, alleges claims relating to violations of that statute concerning, *inter alia*, the Royalty Agreement sued upon which initiated this action. Likewise, Counts XI and XII which relate to tortious interference with a contract, allege claims relating to tortiously interfering with, *inter alia*, the Royalty Agreement sued upon which initiated this action. As aforesaid, the petitioners acknowledge that disputes relating to the Royalty Agreement are not subject to arbitration. Moreover, the only two named defendants in Count XI, Astugue and Reese (the non-Acquirer petitioners), were not parties to the Transaction. Therefore, even accepting the petitioners' arguments to be true, arbitration is precluded.

III. CONCLUSION

Accordingly, for all the foregoing reasons, Rayborn respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

PETER J. BUTLER
RICHARD G. PASSLER
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Telephone: (504) 584-5443

Attorneys for Respondent,
Jerry J. Rayborn, Sr.

APPENDIX

MERGER OF SUN ACQUISITION CORPORATION ("SAC") into SUN DRILLING PRODUCTS CORPORATION ("SUN") pursuant to that certain Agreement dated as of December 8, 1994, as amended, by and among Jerry J. Rayborn, Sr., Jerry J. Rayborn, Jr., Jeffrey Rayborn, Sun, Heller, Hickox, Dimeling, Schreiber & Park, a Pennsylvania general partnership ("HHDS&P") and SAC

February 21, 1995

1. Agreement dated as of December 8, 1994
2. Amendment No. 1 to Agreement
3. Amendment No. 2 to Agreement
4. Jean Rayborn's Consent to Agreement
5. Letter Agreement and Waiver
6. Employment Agreement between Sun and Hyppolete J. Astugue
7. Employment Agreement between Sun and Bailey Fridge
8. Employment Agreement between Sun and Raymond Griffin
9. Employment Agreement/Consulting Agreement between Sun and Buddy Parker
10. Management, Technical Services and Royalty Agreement between Sun and Jerry J. Rayborn, Sr.
11. Real Property Lease from Jerry J. Rayborn, Sr. to Sun – Alvin, Texas
12. Memorandum of Lease – Alvin, Texas
13. Commitment for Owner's and Mortgagee's Policy of Title Insurance – Leasehold Estate, Alvin, Texas

14. Owner's Policy of Title Insurance – Leasehold Estate, Alvin, Texas

15. Real Property Lease from Jerry J. Rayborn, Sr. to Sun – Belle Chasse, Louisiana

16. Jean F. Rayborn's Consent to Belle Chasse, Louisiana Lease

17. Subscription Agreement between Sun and Jerry J. Rayborn, Sr.

18. Registration Rights Agreement between Sun and Messrs. Rayborn, Heller, Hickox, Dimeling, Schreiber, Park and Tuten

19. Subordinate Note in the original principal amount of $2,800,000 from Sun to Jerry J. Rayborn, Sr., Jerry J. Rayborn, Jr., Jeffrey Rayborn and Joel Rayborn, and Letters appointing Jerry J. Rayborn, Sr. as agent for the Subordinate Note

20. Subordinate Pledge Agreen ents between each Pledgor listed below, Sun, Jerry J. Rayborn, Sr., Jerry J. Rayborn, Jr., Jeffrey Rayborn and Joel Rayborn, and blank stock powers

    a. Douglas P. Heller
    b. George K. Hickox, Jr.
    c. William R. Dimeling
    d. Richard R. Schreiber
    e. Steven G. Park
    f. John C. Tuten

21. Shareholders Agreement between Sun, Banc One, Capital Partners II, Limited Partnership and the individuals listed on Schedule A annexed thereto

22. Pilko Environmental Assessment

23. Environmental Indemnity Agreement between Messrs. Heller, Hickox, Dimeling, Schreiber, Park and Tuten, HHDS&P, Sun and Jerry J. Rayborn, Sr.

24. Supplementation of Schedule 3.16 (product formulae) and certificate of Bailey Fridge

25. Documents Evidencing Vesting of Title to Excluded Assets from Sun to Jerry J. Rayborn, Sr.

    a. Vehicles
    b. Assignment of Lafayette Lease
    c. Transfer of Property – Intracoastal
    d. Assignment of All Products Supply Company Lease
    e. Quitclaim of Improvements

26. Intellectual Property Assignments

    a. United States
    b. Venezuela

27. Documents evidencing Barge transfer from Jerry J. Rayborn, Sr. to Sun

28. Interdrill Nigeria Termination Documents

29. Agreement of Merger

30. Documents Evidencing Cancellation of Guarantee of Jerry J. Rayborn, Sr. to First NBC Letter of Credit pursuant to Section 9.15 of Agreement

31. Agreement Regarding Extinguishment of Indebtedness of Jerry J. Rayborn, Sr. pursuant to Section 2.2(d) of Agreement

32. $318,738 Promissory Note by Jerry J. Rayborn, Sr. to Sun marked "Paid in Full" and copy of canceled check from Jerry J. Rayborn, Sr. to Sun pursuant to Section 2.2(e) of Agreement

33. Assignment of Sun Investment Portfolio Account to Jerry J. Rayborn, Sr.

34. Powers of Attorney from Jerry J. Rayborn, Jr., Jeffrey Rayborn and Joel Rayborn to Jerry J. Rayborn, Sr.

35. Letter Agreement from Messrs. Heller, Dimeling, Schreiber, Park and Tuten

36. Pro Forma Beginning Balance Sheet of Sun

37. Landlord Waiver – North Post Oak Business Center, Houston, Texas

38. Guaranty Agreement by HHDS&P in favor of Jerry J. Rayborn, Sr. regarding payments under Royalty Agreement

39. Management Agreement between HHDS&P and Sun

40. Certificate of Jerry J. Rayborn, Sr., as President of Sun and in his individual capacity, Re: Representations and Warranties

41. Officer's Certificate from HHDS&P Re: Representations and Warranties

42. Officer's Certificate from SAC Re: Representations and Warranties

43. Legal Opinion of Reed, Smith, Shaw & McClay delivered pursuant to Agreement

44. Legal Opinion of Sessions & Fishman, L.L.P. delivered pursuant to Agreement and Certificate of Sun to Sessions & Fishman, L.L.P.

45. Letter from Alaskan counsel regarding statute of limitations for tort claims

46. Sun's Secretary's Certificate

47. Proxy of Jean F. Rayborn, as Director of Sun, to Jerry J. Rayborn, Sr.

48. Proxies of John Jeffrey Rayborn, Joel Parker Rayborn and Jerry J. Rayborn, Jr., as Shareholders of Sun, to Jerry J. Rayborn, Sr.

49. Certified Copy of Articles of Incorporation of Sun issued by the Secretary of State of the State of Louisiana

50. Certified Copy of Amended and Restated Articles of Incorporation of Sun issued by the Secretary of State of the State of Louisiana

51. By-Laws of Sun, as amended by Amendment No. 1 to By-Laws of Sun

52. Waiver Agreement regarding Section 11 of By-Laws of Sun between Jerry J. Rayborn, Sr., Jerry J. Rayborn, Jr., Joel Rayborn, Jeffrey Rayborn and Sun

53. Certificate of Existence for Sun issued by the Secretary of State of the State of Louisiana

54. Certificate of Good Standing for Sun issued by the Department of Revenue and Taxation, State of Louisiana

55. Certificate of Foreign Qualification for Sun issued by the Secretary of State of the State of Texas

56. Certificate of Good Standing for Sun issued by the Comptroller of Public Accounts for the State of Texas

57. Certificate of Compliance for Sun issued by the Secretary of State of the State of Alaska

58. Certificate of Status for Sun from Alberta, Canada

59. Certificate of Good Standing for Sun from Scotland

60. Certificate of Good Standing for Sun Drilling Products Corporation de Venezuela, C.A. ("Sun de Venezuela")

61. Director's Certificate Re: Articles of Incorporation of Sun de Venezuela

62. Copy of Certificate No. 1 representing Sun's shares of Sun de Venezuela

63. Certified copy of Articles of Incorporation and Modifications of Sun de Venezuela from the Department of Registry, Caracas, Venezuela

64. SAC Secretary's Certificate

65. Certificate of Existence for SAC issued by the Secretary of State of the State of Louisiana

66. Certificate of Good Standing for SAC issued by the Department of Revenue and Taxation, State of Louisiana

67. Unanimous Consent of Board of Directors of SAC

68. Incumbency Certificate of HHDS&P and Certified Partnership Agreement from HHDS&P

69. Written Consent in Lieu of Meeting of General Partners of HHDS&P

70. Cancelled shares of SAC

71. Affidavit and Indemnification Agreement by Jerry J. Rayborn, Sr. as to lost shares of Sun

72. Cancelled shares of Sun pre-merger stock

73. Copies of share certificates of Messrs. Heller, Hickox, Dimeling, Schreiber, Park and Tuten representing their respective shares of Sun

See Signature Page for Legend

MANAGEMENT, TECHNICAL SERVICES AND ROYALTY AGREEMENT

THIS AGREEMENT is entered into as of this 21st day of February, 1995, between SUN DRILLING PRODUCTS CORPORATION, a Louisiana corporation, ("SDP"), and JERRY J. RAYBORN, SR. ("JJR").

WHEREAS, SDP, Heller Hickox Dimeling Schreiber & Park, a Pennsylvania general partnership, and Sun Acquisition Corporation, a Louisiana corporation ("Acquisition"), have entered into that certain Agreement dated December 8, 1994 (as amended, the "Merger Agreement"), pursuant to which Acquisition will merge with and into SDP and SDP will be the surviving corporation (the "Merger"); and

WHEREAS, as a result of the Merger, JJR will receive total consideration in cash and notes of $10,200,000.00 and certain debts of JJR and his affiliates owed to SDP aggregating approximately $2,200,000.00 will be forgiven;

WHEREAS, as a condition to the Merger, Heller, Hickox, Dimeling, Schreiber & Park and Acquisition required that JJR be retained as an employee of SDP after the effective date of the Merger and that JJR be required to enter into this Agreement; and

WHEREAS, immediately subsequent to the effective date of the Merger, JJR will own twenty-five percent (25%) of the issued and outstanding stock of SDP;

WHEREAS, prior to the effective date of the Merger, JJR had been President of SDP; and

WHEREAS, JJR and SDP desire to enter into a management, technical services and royalty agreement effective as of the date of this Agreement.

* * *

IN WITNESS WHEREOF, SDP has caused this Agreement to be duly executed in duplicate, and JJR has hereunto set his hand, on the day and year first above written.

SUN DRILLING PRODUCTS CORPORATION
a Louisiana Corporation

By: /s/ Hyppolete J. Astugue
Name: _____
Title: _____

/s/ Jerry J. Rayborn, Sr.
Jerry J. Rayborn, Sr.

LEGEND

THE RIGHTS, TITLE AND INTEREST OF ANY HOLDER OF THIS ROYALTY AGREEMENT ARE SECONDARY, SUBORDINATE AND INFERIOR TO THE RIGHTS, TITLE AND INTEREST OF THE HOLDERS OF THOSE TWO CERTAIN PROMISSORY NOTES DATED FEBRUARY 21, 1995, EXECUTED BY SUN DRILLING PRODUCTS CORPORATION, PAYABLE TO THE ORDER OF BANC ONE CAPITAL PARTNERS II, LIMITED PARTNERSHIP IN THE PRINCIPAL AMOUNTS OF $2,000,000 AND $4,000,000 RESPECTFULLY AS THE SAME MAY BE MODIFIED, AMENDED, RENEWED, EXTENDED, RESTATED OR REPLACED FROM TIME TO TIME PURSUANT TO A SUBORDINATION AND INTERCREDITOR AGREEMENT AMONG BANC ONE CAPITAL PARTNERS II, LIMITED PARTNERSHIP AND JERRY J. RAYBORN, SR., JERRY J. RAYBORN, JR., JEFFREY RAYBORN AND JOEL RAYBORN.

TWENTY-FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

SUN DRILLING PRODUCTS CORPORATION	NO. 41-857
VERSUS	
JERRY J. RAYBORN, SR.	DIVISION "B"
AND	
JERRY J. RAYBORN, SR.	NO. 42-278
VERSUS	
SUN DRILLING PRODUCTS CORPORATION, HYPPOLETE ASTUGUE AND SUSAN REESE	DIVISION "B"
AND	
JERRY J. RAYBORN, SR.	NO. 42-330
VERSUS	
SUN DRILLING PRODUCTS CORPORATION HELLER, HICKOX DIMELING, SCHREIBER AND PARK, DOUGLAS P. HELLER, GEORGE K. HICKOX, JR., STEPHEN G. PARK, HYPPLOETE ASTUGUE AND SUSAN REESE	DIVISION "B"

Argument and Notes of Evidence taken before the HONORABLE WILLIAM A. ROE, Judge, presiding on Thursday, the 21st day of August, 1997.

PRESENT:

GEORGE PIVACH, II, ESQ.

DOUGLAS CHRISTIAN, ESQ.

ROBERT KAUFMAN, ESQ.

Attorneys for Sun Drilling Products Corporation; Heller, Hickox, Dimeling, Schreiber and Park, Douglas P. Heller, George K. Hickox, Jr., Stephen G. Park, Hyppolete Astugue and Susan Reese

EDWARD D. WEGMANN, ESQ.
Attorney for Hyppolete Astugue and Susan Reese

PHILIP F. COSSICH, JR., ESQ.

PETER J. BUTLER, ESQ.

RICHARD PASSLER, ESQ.

LES MARTIN, ESQ.

Attorneys for Jerry J. Rayborn, Sr.

REPORTED BY:

PETER P. BORRELLO, JR.

Official Court Reporter

* * *

And in that context, several things struck me as significant. One is the issue of waiver in terms of the initial litigation being filed in this court. I understand that there are separate contracts in connection with the relationship between Mr. Rayborn and the other parties in this litigation. I understand that the plaintiffs in the initial suit were careful to make that controversy, one apparently dealing with only one contract, which itself did not contain an arbitration provision. But, as Mr. Butler pointed out, the initial contract containing the arbitration provision creates in effect all of the other contractual relationships between the parties, including the one sued upon in 41-857 of the document of this court. Sun Drilling sought the protection of this court and sought to have a contractual provision rescinded and a contractual relationship between it and Jerry Rayborn, Sr. terminated judicially, but now when the other aspects of their relationship are brought at issue, not in a separate suit, but in a Reconventional Demand to that initial suit and now they seek the protection of that contract in terms of the requirement of arbitration. The Court has studied "George Engine versus Southern Ship Building Corporation" carefully and I agree that it is apparently on point.

I am intrigued by the argument as has been pointed out in the jurisprudence and in argument in this matter, that if the contract itself is invalid, then there is a good argument that the requirement of arbitration in that contract is unenforceable. To suggest that the choice of laws provision in that contract is enforceable, even absent the enforceability of the arbitration provision, does not stand up. If in fact I may relieve the parties of an obligation to

arbitrate because of the possibility – because the issue to be arbitrated and that is the validity of the contract itself is not enforceable, then surely a choice of laws provision in that same enforceable contract is not enforceable. That again, I believe, is a reasonable position to take in view of the fact that the parties seeking to enforce arbitration, first sought the protection of this court. First sought litigation as a means of addressing the disputes between them, rather than arbitration.

Finally, as a practical matter, one final compelling reason for me to believe that arbitration – that these exceptions should not be granted – well, first of all, back to the phrase of, "alternative means of dispute resolution." I am compelled to disregard the general language favoring arbitration in the jurisprudence because of the fact that I am convinced that arbitration in this context, in the context of the litigation that is presented to this court, is obviously very complicated; obviously multi-facetted and involving a number of contractual relationships between these parties, would in fact lend little to the Court in terms of dispute resolution. It would resolve very little. It would be fruitless, pointless and the only issue that might be resolved by arbitration can be resolved by arbitration can be resolved by this Court in the context of the presentation of evidence and witnesses, which would proceed in the context of all of the claims between the parties.

Finally, one compelling aspect of this legal issue is the issue of appeal. Were I to grant these exceptions and order or allow the arbitration, the result would be as follows: "A district court's refusal to stay its proceedings pending arbitration of a dispute, is not a final appealable

order." On the other hand, "The Court of Appeals freely refute a district court's refusal to compel parties to return to arbitration and a refusal to stay a party's action concerning arbitration is an appealable judgment, which may be heard by the Court of Appeals." Gentlemen, not that I don't have faith in my own judgment, not that I don't trust that you do, but under these circumstances in these situations, I am giving solace or its [sic] somewhat eases my mind that the denial of these exceptions, which I think is the proper ruling in this matter, allows you to take an appeal, I believe, to the appellate courts. And thus at the outset resolve the issue on the appellate level so that we may either proceed with this litigation, as I believe it should proceed or have the appellate court stay these proceedings and allow or compel you to arbitrate the issues of the validity of the contract.

Therefore and for those reasons, the Exception of Lack of Subject Matter Jurisdiction as to Counts, I, II, VII, VIII, IX, X, XI, and XII of the Reconventional Demand in 41-857 are denied.

MR. PIVACH: Your Honor, we respectfully object to the Court's decision on your denial of our exceptions. We are mindful of your reasons for denial and we understand the Court's position. With that in mind, Your Honor, would we be allowed to have stay of time sufficient enough for us to seek writ to the Court of Appeals?

THE COURT: No. I will not stay these proceedings. My suggestion is to seek a stay from the Fourth Circuit.

MR. PIVACH: Is there any particular reason, Your Honor? With the voluminous nature of the pleadings that

have been filed in this matter so far, if we can get a quick resolution of that through the Court of Appeals –

THE COURT: Because I am not going to bet against myself. If I thought I was going to be reversed, I would have ruled the other way. I think I made the right ruling. I think that the Fourth Circuit is going to affirm me. And I am not going to bet against myself. I am going to proceed as if this litigation were going to proceed with or without the Fourth Circuit's interference. Additionally, there are other issues in this litigation that need not be stayed whether I am right or wrong.

* * *

CERTIFICATE

I, PETER P. BORRELLO, JR., Official Court Reporter, do hereby certify that the foregoing one hundred and one (101) pages is a true and correct transcript of my stenographic notes taken down by me and transcribed to the best of my ability and understanding of the above-entitled and numbered cause.

/s/ Peter P. Borrello, Jr.
PETER P. BORRELLO, JR.
Official Court Reporter